



European Commission

Competition

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MOFCOM: Workshop on merger remedies

Types of remedies

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Agenda

- Overview
- Some statistics
- Divestitures
- Removal of links with competitors
- Access commitments
- Behavioural/other commitments
- Procedural aspects



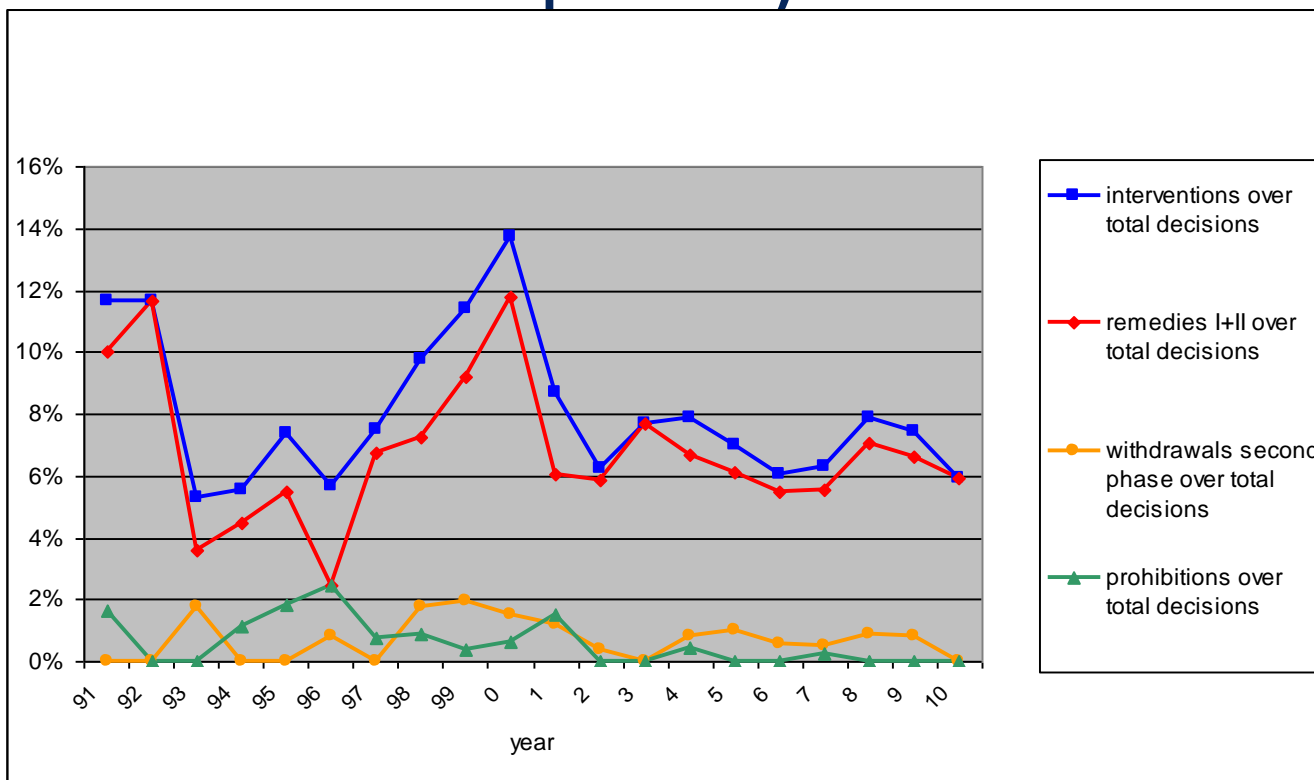
Types of Remedies: Overview

- **Divestitures:**
 - generally preferred
- **Removal of links with competitors:**
 - Divestiture of minority shareholding or, exceptionally, waiving rights related to minority stakes
 - Termination of distribution or other contractual arrangements
- **Access commitments:**
 - Granting of non-discriminatory access to infrastructure, networks, technology/IP rights or essential inputs.
- **Behavioural / other remedies:**
 - To be assessed on a case-by-case basis,
 - Difficulty of monitoring and risks of effectiveness: they may only amount to mere declarations of intentions



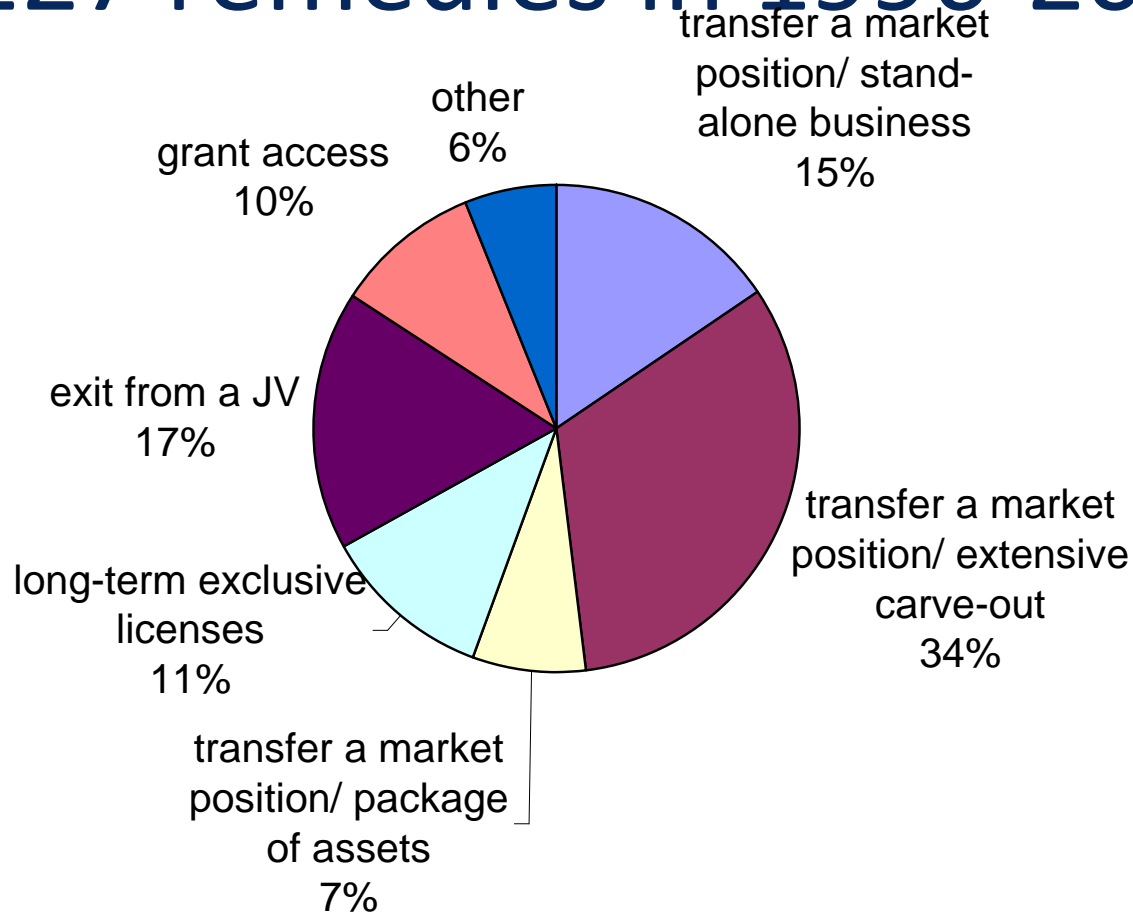
Interventions

(remedies, prohibitions, withdrawals sec. phase)



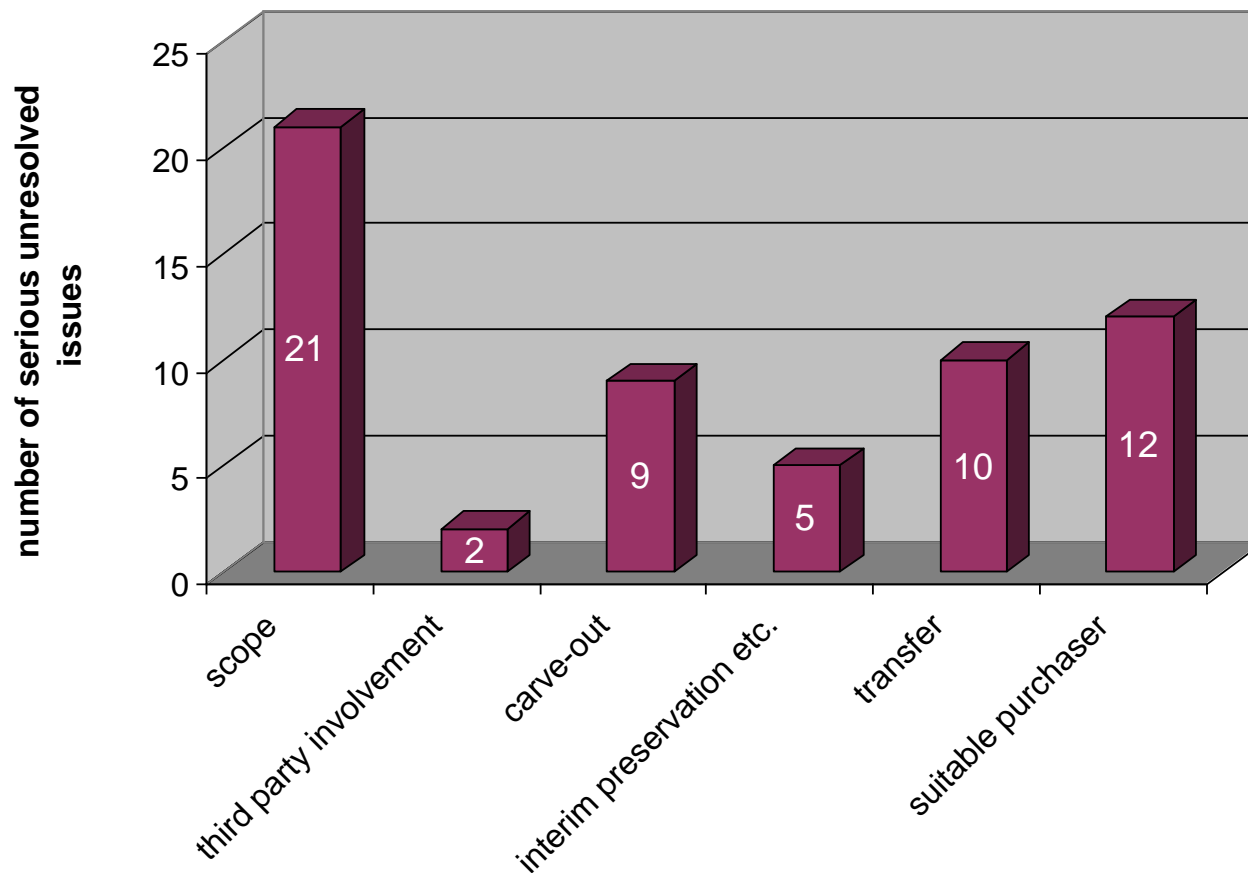


All 227 remedies in 1996-2000






Remedies' study: unresolved issues in particular in divestiture cases





Remedies' study: information requirements

- Remedies study: sufficient information is crucial
 - There is a clear asymmetry of information in particular on the right scope of viable business for divestitures; Commission has the burden of motivation to reject commitments
- 
- New information obligation of the parties to be included in the Implementing Regulation: **Form RM**
 - Nature and scope of commitments offered;
 - Conditions for their implementation; and
 - Suitability to remove any impediment to effective competition
 - Deviations from Commission's Model Texts
 - For divestitures, in particular, detailed factual description required on how the business is currently operated; to be compared with scope of Divested Business as offered in the commitments



Types of Remedies: Divestiture – Scope (1)

- All assets and personnel which contribute to the current operation of the business and which are necessary to ensure that a viable and competitive business will be transferred
 - tangible assets (such as production, distribution, sales and marketing activities)
 - intangible assets (such as intellectual property rights, brands,)
 - personnel, supply and sales agreements, customer lists, third party service agreements, technical assistance, etc.
 - identification of assets not to be divested
 - Generally resources of a potential purchaser not to be taken into account (only if fix-it first), but waivers possible once buyer is approved



Types of Remedies: Divestiture – Scope (2)

- Preference for stand-alone business and for separate legal entities
- Carve-outs
 - Risks for viability and competitiveness to be limited by requiring transfer of a stand-alone business
 - Preferably as reverse carve-out
- Divestiture of brands, licenses, re-branding acceptable in exceptional circumstances
 - If resulting business will be immediately viable in hands of suitable purchaser
 - In case of doubts concerning purchaser or licensee, up-front buyer or fix-it-first solution could be required
- Alternative divestitures (“Crown jewels”)



Types of Remedies: Divestitures - Purchaser

- Suitable purchaser to be found/approved after decision (normal procedure)
- **Up-front buyer** (=no implementation prior to buyer approval)
 - Uncertainty of implementation
 - Obstacles for divestiture, e.g. third party rights (*Omya/Huber*)
 - Uncertainty that Business will attract suitable purchaser (although complete scope)
 - Difficult interim preservation:
 - If parties cannot undertake carve-out in the interim
 - If high risk of degradation
- **Fix-it-first remedy** (=binding agreement before final decision)
 - Preferable where identity of purchaser is crucial for effectiveness of remedy
 - *E.g.* if viability is ensured by specific assets of the purchaser (*Inco/Falconbridge*) or where purchaser needs to have specific characteristics (*tele.ring*)



Types of remedies: removal of links with competitors

- Divestiture of (minority) shareholdings in competitors
 - IPIC/MAN Ferrostaal (2009):
 - Concern based on MAN Ferrostaal's participation in Eurotecnica, a supplier of technology essential for competitors production of melamine
 - Remedy: divestiture of the Eurotecnica stake by MAN Ferrostaal
- Withdrawal from Joint Ventures with competitors
 - See GDF Suez/International Power (2011):
 - Concern based on International Power's joint control of T-Power joint venture ...
 - ... but the theory of harm (possibility to use sensitive information regarding the T-Power plant) would equally apply to a minorityshareholding!
- Termination of agreements with competitors



Types of Remedies: Access Commitments

- Access commitments: non-discriminatory access to infrastructure, networks, technology/IP rights or essential inputs.
 - Acceptable if same effect as a divestiture
 - Lowering entry barriers: only if there will be actual entry of new competitors and such entry will be timely and likely
 - Foreclosure concerns: only if competitors will actually use these commitments
 - Monitoring of such commitments
 - Via market participants: self-enforcement of commitments (arbitration clauses)
 - Via national regulators



Types of Remedies: Access Commitments

Access to **infrastructure**

(Shell/Dea, Vodafone/Mannesmann, Newscorp/Telepiu, Tollcollect)

Sensitive issues:

- Terms of access must be precise but leave room for particular situations of potential beneficiaries that are yet unknown
- Provision of technical information and assistance
- Access fee levels determine incentives to compete -> formulas (cost+), published indices, past practice, comparable markets

Access to key **technology, licensing** *(Alcan/Pechiney, Axalto/Gemplus)*

- Transfer of know how is essential
- License fee levels determine incentives to compete
- Choice exclusive/non-excl. license; co-license with parties problematic
- Foresee provisions for pass-on/license-back



Types of Remedies: Access Commitments

Access to technical **interfaces**

(*GE/Instrumentarium, Siemens/Draeger, Axalto/Gemplus*)

- Technical information and assistance

Access to **content** (media)

(*Vivendi/Canal+, Newscorp/Telepiu*)

- Valuable concept for different platforms (payTV, satellite, free)

Access to product **liquidity**

(gas release in *EDF/EnBW, Verbund, Eon/Mol*)

- Auction system suitable for all types of customers

Access to **essential inputs**

(access to raw milk in *Friesland/Campina*)

- Possibly as a means to ensure viability of a structural remedy



Types of Remedies: Access Commitments

- Slot release remedies – *Iberia/Clickair/Vueling, Lufthansa/SN Airholding, Lufthansa/Austrian Airlines*
 - Release (and eventually transfer) of slots without compensation in a 20 minutes' window and without limitations regarding peak hours
 - Slots (initially) earmarked with regard to the problematic routes
 - Transfer of grandfather rights if slots used regularly in a minimum period (e.g. 4/2 IATA seasons)
- Legal standard for slot release remedies under the Remedies Notice and the CFI's *easyJet* Judgment
 - Remedies must lead to actual entry of new competitors and such entry must be timely and likely
 - Market test of the remedies should confirm interest of competitors to enter the problematic routes



Types of Remedies: Behavioral Remedies

CFI in Tetra Laval/Sidel

- Conglomerate merger combining carton and PET packaging for liquids
- Theory of harm: Dominant position in carton (TetraPak) will be leveraged into market for PET via tying, predatory pricing, price wars and loyalty rebates
- Commitment offered: hold separate of Tetra and Sidel; no bundling, no predation/discrimination (=Art. 82 decision against TetraPak)
- Remedies rejected by COM: purely behavioural and mere promise not to abuse, impossible to monitor
- CFI: stresses particularity of conglomerate mergers where dominant position is only created via a certain behaviour, as opposed to direct change in market structure (<-> Gencor)
- in these situations behavioural remedies have to be considered by the agency, even if they overlap with duties under Art. 82 and amount to promises not to abuse
- confirmed in ECJ appeal



Remedies in Intel/McAfee

- Conglomerate merger between dominant chipmaker and number two security software vendor
- Interoperability
 - continue disclosure to SSV
 - 1 year before commercial launch of new hardware
 - opportunity to compete like McAfee
- Tying
 - Possibility to switch off the tied endpoint security product
- No separate remedy on commercial bundling
- McAfee interoperability with AMD CPU
 - no active unnecessary degradation of McAfee performance
- Scope: computers, worldwide, 5 years



Types of Remedies: Behavioural/Other Remedies - Essentials

- Precise drafting is vital
 - Define essentials of access etc. as comprehensively as possible
 - Revert to feedback of the market test and experts for technical details
 - Fees/Pricing: Determine upfront with clear criteria for potential adjustment (indices)
 - References to “industry practice” etc. possible if backed up by efficient **dispute settlement mechanism**
- Foresee adjustment to changing market conditions
 - Changing market can make remedy counterproductive or superfluous
 - Remedy can be limited in time upfront: legal certainty for all market participants, but difficult to prolong if necessary
 - Preferable: Possibility for review after initial period upon request



Types of Remedies: Behavioural/Other Remedies – What to avoid

Long term supply contracts

- can create links and interaction between competitors
- information dissemination about cost structure
- fixes existing market structures

Price caps

- heavy market intervention
- risk of perverse effects

Firewalls

- virtually impossible to monitor



Procedural aspects

- Negotiations
- Market test
- Commitments text



Procedural aspects: Negotiations with the parties

- Remedies must be **proportionate** => negotiations not for sake of bargaining but to obtain **solution that fully eliminates competition problems**
- Some practical advice
 - Be firm on goals but flexible on the way to achieve them
 - Good preparation and solid investigation are key to a strong bargaining position
 - Fairness, transparency and non-confrontational atmosphere help to find good solution
- Model or “standard” texts simplify the task
- Timing



Procedural aspects: Market Test (1)

- Every remedy proposal should be assessed as to market testability
- Remedies' submissions should not be market tested too early
 - limits negotiations
 - may create the need for several market tests in parallel to the market investigation
 - may create proportionality issues
 - may create biased answers to the investigation
- Co-ordination with other authorities before market test
 - avoiding double remedies
 - ensuring consistent approach to same competition concerns



Procedural aspects: Market Test (2)

Testing

- Careful drafting of questionnaire is essential
- Summary and non-confidential version of the remedies to be added to the questionnaire

Assessment of replies

- Be aware of bias: competitors hunting for divestiture fall-out may want to weaken their competitor

Modifications of remedies after testing

- Clear-cut solution to the problems indicated in the market test necessary since normally no further testing possible (particularly in Phase I)



Procedural aspects: drafting the decision

- Section on remedies assessment in decision
 - Describe procedure and summarise remedies
 - Reference to market test and theory of harm
 - Show why and how serious doubts/competition concerns are removed
- In order to ensure that parties comply with their commitments in a timely and effective manner, the Commission may attach **conditions or obligations** relating to the commitments
- Commitments will be attached to the decision („commitments attached as Annex form an integral part of the decision“)
 - Cover text (legal part – **Model Cover Text**)
 - Schedules (exact description of remedies)



Procedural aspects: Conditions & Obligations (1)

- Merger Regulation Articles 6(2) para. 2 and 8(2) para. 2:
The Commission may attach to its decision (under paragraph 1(b)) conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.
- **Conditions**: requirements for achievement of the structural change of the market (e.g. divestiture as such)
- **Obligations**: implementing steps which are necessary to achieve this result (e.g. trustee, hold separate)



Procedural aspects: Conditions & Obligations (2)

- If a **condition** attached to a certain commitment in the clearance decision is not fulfilled
 - ⇒ the concentration is not authorised because the situation rendering the concentration compatible with the common market does not materialise
 - ⇒ the concentration is treated as if implemented without authorisation
 - ⇒ “the decision no longer stands”



Procedural aspects: Conditions & Obligations (3)

- Breach of a **condition** - Article 8(4), 8(5):
 - Commission may require separation of assets or cessation of joint control (to situation prior)
 - Commission may order any appropriate measure (including interim measures) to restore conditions of effective competition
 - Commission may impose finances and/or periodic penalty payments under Article 14(2)(c), 15(1)(c)
- Breach of an **obligation**:
 - Commission may revoke the clearance decision, Articles 6(3), 8(6)
 - also fines and/or periodic penalty payments



Procedural aspects: Commitments text (1)

- Commitments text:
 - Cover text (legal part)
 - Schedules (exact description of remedies)
- Essential for cover text: **Model cover text**
- Require compared version from the parties in order to see deviations from standard text
- Parties often try
 - to shift risk to the Commission (e.g. transfer of contracts “subject to the customers’/suppliers’ approval”)
 - or to limit their obligations (e.g. divestment of “relevant” key personnel instead of “all key personnel (as defined in Schedule)”)
- Take care that the Commission is not exposed to such risks and that the remedy is not diminished afterwards



Procedural aspects: Commitments text (2)

Main provisions of the cover text

- Timing: two-step process
 - First divestiture period (parties): normally 6 months
 - Trustee divestiture period (fire sale by trustee): normally + 3 months
- Divestitures: non buy back obligation for 10 years
- Review clause: standard in all types of commitments
 - Extension of deadlines
 - In exceptional circumstances and if parties show good cause: waive, modify or substitute commitments
 - New: Commission may request adjustment of implementing features (auctions in gas release remedies) if remedy ineffective
- Provisions on trustees, hold separate, ring-fencing, purchaser requirements etc. => Implementation